

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
HECTOR T. AYU**

Petitioner

Hector T. Ayu
For the Petition

Stanley D. Abrams, Esquire
Keith Rosa, Esquire
Attorneys for the Petitioner

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Board of Appeals Case No. S-2655
(OZAH Case No. 06-06)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS	PAGE
I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND.....	3
A. The Subject Property	3
B. The Neighborhood and its Character	4
C. The Master Plan.....	7
D. Proposed Use	7
III. SUMMARY OF THE HEARING	13
IV. FINDINGS AND CONCLUSIONS.....	16
A. Standard for Evaluation.....	17
B. General Conditions	18
C. Specific Standards	24
D. Additional Applicable Standards	25
V. RECOMMENDATION	26

I. STATEMENT OF THE CASE

Petition No. S-2655, filed on July 21, 2005, seeks a special exception, pursuant to §59-G-2.48 of the Zoning Ordinance, to permit a retail establishment (a drug store) in an existing office building located at 1111 Spring Street, Silver Spring, Maryland. The site is zoned C-O (Commercial-Office Building), and the Tax Account Number is 01431020. Petitioner seeks permission to establish a pharmacy in Suite 110, property which he has leased (Exhibit 9) on the ground floor of a three-story professional office building.

On July 29, 2005, the Board of Appeals issued a notice (Exhibit 10) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on December 20, 2005, at 9:30 a.m., in the Stella B. Werner Council Office Building. On November 8, 2005, Petitioner's attorney filed a letter seeking to amend the petition by adding a letter from a transportation expert, Lee Cunningham, assessing the traffic impact of the proposed use (Exhibit 14). Notice of that motion was issued on November 15, 2005 (Exhibit 15). The motion was unopposed and therefore granted, under the terms of the notice, on November 25, 2005.

On November 21, 2005, the Woodside Park Civic Association (WPCA) filed a letter requesting that the hearing be continued so that the Association would have more time to review Petitioner's traffic impact letter (Exhibit 16). Petitioner's attorney, Stanley Abrams, Esquire, opposed the requested continuance because postponement of the hearing would have "a severe financial impact" on his client, a sole proprietor who will have to pay rentals for the subject location beginning January 1, 2006. Exhibit 17. Moreover, Mr. Abrams argued that the WPCA's traffic concerns were unwarranted and, in any event, not attributable to the Petitioner. Based on these arguments and on the fact that the traffic impact statement was only two pages long, giving WPCA ample time to analyze it prior to the hearing date, the Hearing Examiner denied the continuance request on November 28, 2005. Exhibit 18.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated December 2, 2005, recommended approval of the petition, with conditions (Exhibit 19).¹ On December 9, 2005, the Planning Board voted unanimously to approve the petition, recommending the same conditions as Technical Staff (Exhibit 20).

The only community response to the requested special exception consists of the above-mentioned letter from WPCA (Exhibit 16) expressing a concern about traffic, a petition (Exhibit 24) signed by 14 medical professionals in the building supporting the application, and an anonymous letter (Exhibit 13), allegedly from another tenant, expressing some concerns about the potential for security problems in the building if a pharmacy were approved. Because this letter was anonymous, it was not admitted into evidence as establishing that there is a security problem; however, the Hearing Examiner did ask Petitioner to at least address the question of security in his evidence, and he did so.

A public hearing was convened as scheduled on December 20, 2005, and testimony was presented by Petitioner. There were no other witnesses, and the record closed at the end of the hearing. There is no opposition in this case, and all the evidence supports granting the petition.

II. FACTUAL BACKGROUND

A. The Subject Property

As noted above, the subject property is located at 1111 Spring Street, in Silver Spring, and is zoned C-O. The property is approximately 8,500 square feet in area, according to Technical Staff, and it is more particularly known as Lot 2, Block 1 of the subdivision known as Griffith's Addition to Woodside Park. The office building is sited on the northeast corner of Spring Street and Fairview Road, on the dividing line with the Silver Spring Central Business District (CBD) Sector Plan area. The property is improved with a three story, brick office building that was constructed in 1967, and is mostly occupied by medical offices. The special exception area is to occupy Suite 110, a 1525 square

¹ The Technical Staff Report is frequently quoted and paraphrased herein.

foot. area on the lobby level of the office building, which was formerly occupied by a medical office.

A photograph of the front of the building, as viewed from Spring Street (*i.e.* looking northeast) is shown below (Exhibit 7(d)):



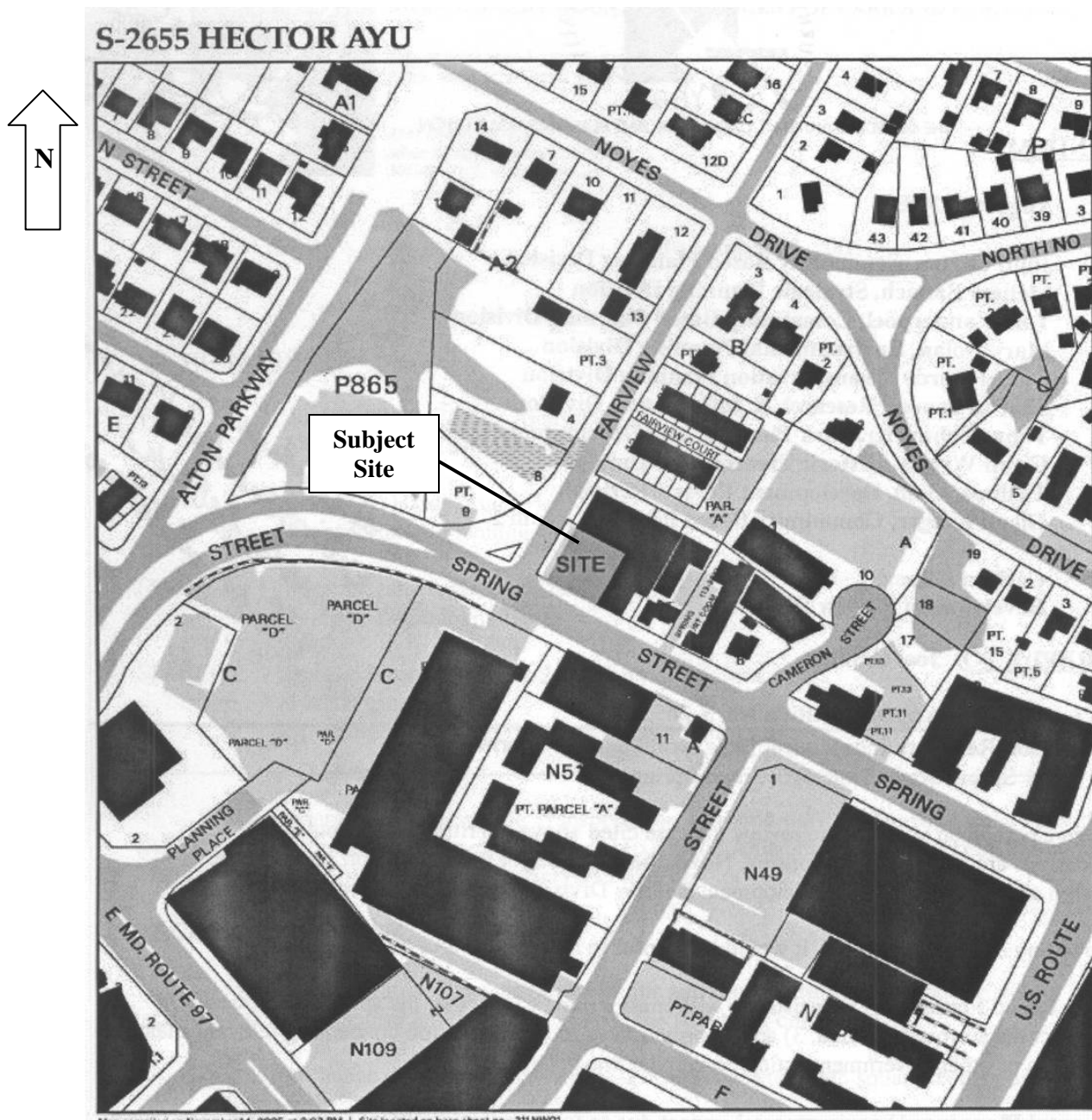
Front of Building Where Pharmacy to be Located
(Spring Street)

B. The Neighborhood and its Character

The building is surrounded on two sides (northeast and east) by a six story office building. Across Fairview Street is a park and across Spring Street are both a garage and surface parking. The site is in a portion of the Woodside Park Neighborhood, described by Technical Staff as “a

small transitional commercial area,” and consisting of the central business district across Spring Street, offices on site and adjacent, townhouses and one-family residential.² Exhibit 19, page 3.

The Site and the surrounding area are shown on the following vicinity map from the Technical Staff report, and are also depicted on the next page in an aerial photo from that report:



² Staff notes that several years ago there was a pharmacy located across the street in the CBD zone in property that is now under redevelopment by United Therapeutics.



Technical Staff opined that the general neighborhood should be narrowly defined in this case because “the proposed use will be very difficult to perceive,” in that it will replace a medical office tenant in a building which is “wrapped” on two sides by another building. Petitioner agrees with Technical Staff’s definition of the general neighborhood and accepts their recommended conditions.

Tr. 9. The Hearing Examiner also accepts the general neighborhood boundaries proposed by Technical Staff, which are limited to the adjoining and confronting properties, as follows: East along Spring Street is property zoned C-O with office use; north of the property is land zoned C-O and improved with a 6-story office building;³ west (within the Woodside Park Community) is property zoned R -60 which is improved with the M-NCPPC Fairview Park;⁴ and south of Spring Street is property located within the Silver Spring CBD, zoned CBD-1 and CBD-2, and improved with a public parking garage, a parking lot behind the M-NCPPC building and a three story office building occupied by United Therapeutics.

As described by Petitioner in his Pre-hearing Statement (Exhibit 3, page 2), “the character of

³ Continuing north, the property is zoned RT-12.5 and improved with townhouses, beyond which is land zoned R-60 and improved with single family houses in the Woodside Park Community.

⁴ Behind the park is an off-street parking area which is used by tenants of the office building across Fairview Avenue.

the surrounding area is a mix of professional and general office use, institutional, governmental and residential uses with the subject property oriented toward the Silver Spring CBD across Spring Street. Ample parking exists in the parking garage across Spring Street from the subject property as well as on-street parking.”

C. The Master Plan

The property is located within the area covered by the *North & West Silver Spring Master Plan*, approved and adopted in August 2000. It accepts the current C-O zoning (page 36), and a retail establishment (drug store) in an existing office building is allowed by special exception in that zone. *See* Zoning Ordinance §59-C-4.2 (d). The Master Plan makes no recommendation specific to this site, but as noted by Technical Staff, it identifies areas around the Silver Spring CBD and along major roads where low intensity office uses are present or recommended as a transition in use, density, and building heights. Technical Staff found that the building at 1111 Spring Street fits this description. Exhibit 19, pp. 5-6.

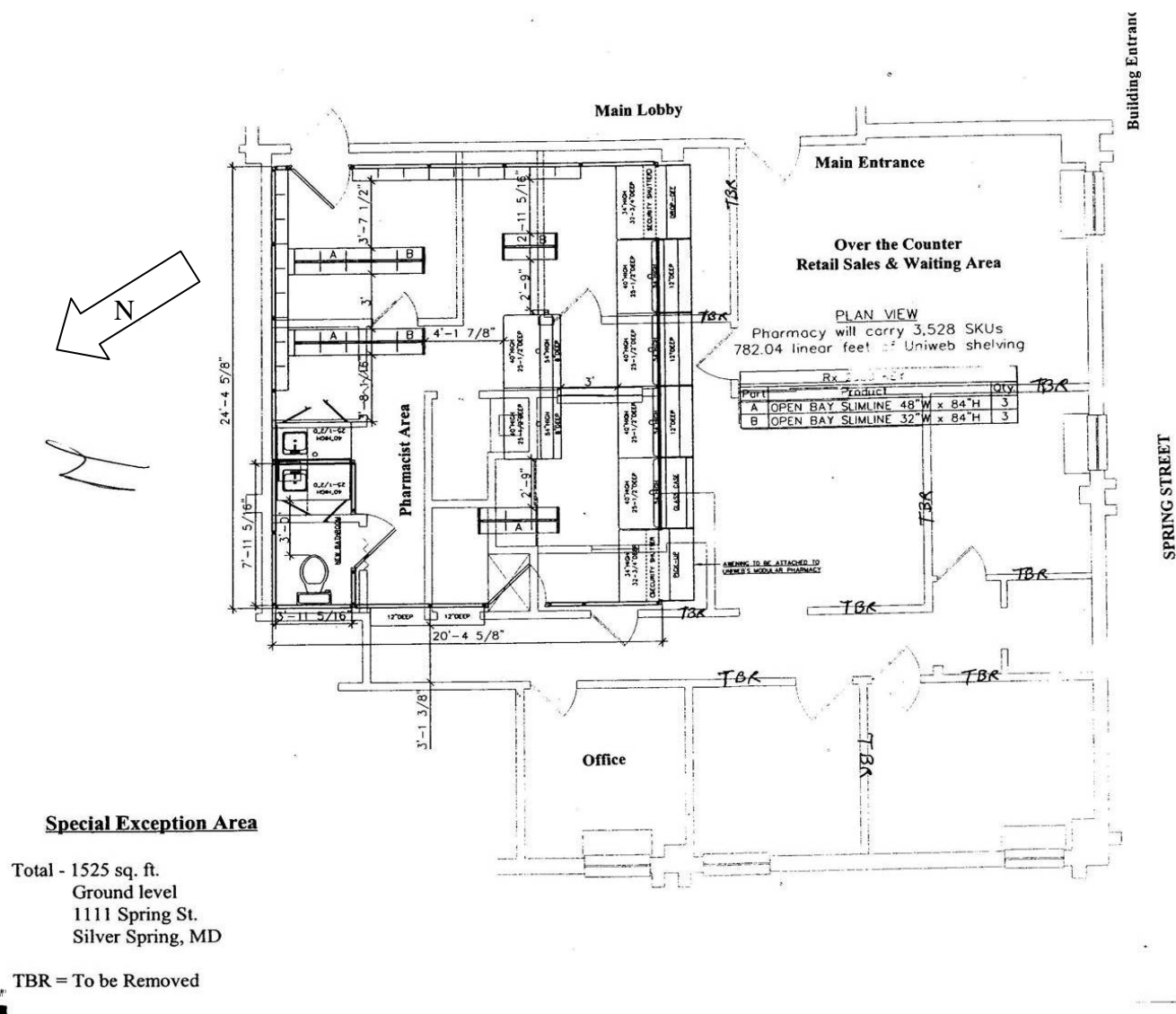
The Master Plan’s recommendations regarding special exceptions address, almost exclusively, special exceptions in residential zones. *See* pages 42-43. The one general recommendation for special exception uses concerns landscaping, which has no application to the subject petition because the requested use is inside of an existing office building.

Technical Staff concludes, and the Hearing Examiner agrees, that “the proposed use is consistent with the *North and West Silver Spring Master Plan . . .*” Exhibit 19, page 9.

D. The Proposed Use

Petitioner proposes to open a pharmacy within the existing office building located at 1111 Spring Street, in Silver Spring. The 1,525 square-foot area devoted to the special exception use (Suite 110) is situated on the lobby level of the office building. This section of the building was formerly occupied by a medical office. The special exception area is accessed only from the interior lobby and

has no direct access to the public streets adjoining the property, which is a requirement of this special exception. Zoning Ordinance §59-G-2.48. The proposed layout can be seen below on the Floor Plan (Exhibit 4(c)), which serves as the Site Plan for this special exception. Exhibit 4(e) shows the same space after the walls, labeled “TBR,” have been removed.



Renovations will be totally interior to the building and will include installation of counters, glass cases, shelving and a new bathroom. Equipment would include a refrigerator and pill counting/sorting machines, as well as traditional office equipment. Drop-off and pick-up windows will also be provided.

The pharmacy would be open to the public Monday through Friday, from 9:00 a.m. to 7:00 p.m., and on Saturday from 9:00 a.m. to 2:00 p.m.; however, employees will arrive at 8:00 a.m., Monday – Saturday. Technical Staff found these hours to be appropriate, and the Hearing Examiner agrees.

There will be one pharmacist and two technician/cashier employees initially, with two more technician/cashier staffers to be added in the future (*i.e.*, for a total staff of five). The business will be directed towards the sale of prescriptions and non-prescription drugs to users of medical offices in the building and the nearby vicinity, which is expected to generate more than 90% of the sales, according to Petitioner's pre-hearing statement (Exhibit 3). There is no plan to sell other items like cosmetics, stationary, foods and tobacco.

As stated in Petitioner's Pre-hearing Statement, "[t]he proposed pharmacy will complement existing medical service operations in the building to engender a more complete and convenient health care delivery system. It will provide easy access to patients receiving medical attention and prescriptions from physicians." Exhibit 3, page 2.

The Woodside Park Civic Association raised a concern about the potential impact of traffic generated by the proposed pharmacy (Exhibit 16). Transportation Planning Staff found that, given the modest, 1525 square feet of floor space allocated for the proposed use, the special exception would not adversely affect nearby roadway conditions or pedestrian facilities.

The Transportation Planning Staff also determined that the proposal will satisfy Local Area Transportation Review (LATR) without the need for a traffic study, based on trip-generation data from the Institute of Transportation Engineers' *Trip Generation – 7th Edition*. The total number of estimated peak hour trips for the entire medical office building (15, 040 square feet of usable floor space) is 12 morning peak hour trips and 27 evening peak hour trips. According to Transportation

Staff, 5 of those morning trips and 14 of the evening trips would be attributable to the pharmacy.⁵ See Transportation Planning Staff's report, attached to Exhibit 19. Thus, the *FY 2005 Annual Growth Policy* would not require a traffic study to satisfy Local Area Transportation Review because the proposed special exception use generates fewer than 30 peak-hour vehicular trips within the weekday morning and evening peak periods.

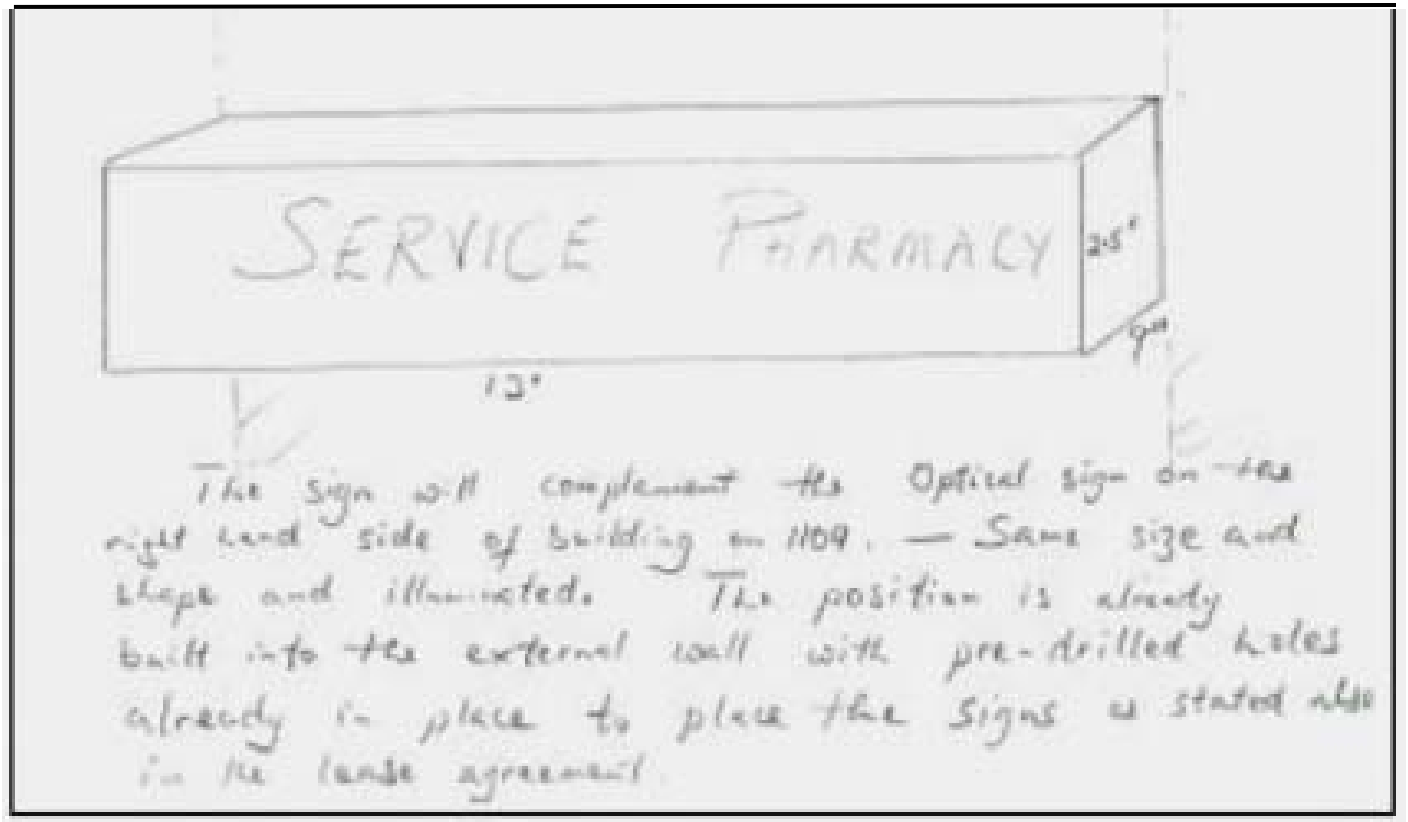
There is no vehicular access onto the subject site. Pedestrian access to the building is via sidewalks on Spring Street, where the main entrance to the building is located. Spring Street has metered parking in front of the property, and a public parking garage is located across the street. According to Technical Staff, the proposed use would ordinarily be required to provide 8 off-street parking spaces, as prescribed for general retail of this size under Zoning Ordinance §59-E-3.7; however, the subject site is within the Silver Spring Parking District, and therefore Petitioner must pay an *ad valorem* tax in lieu of satisfying the number of required off-street spaces. A condition was recommended by Technical Staff and the Planning Board to this effect, and Petitioner has agreed to it. Tr. 30. That condition is recommended in Part V of this report.

Technical Staff indicates that there are no environmental or lighting issues in this case since there will be no external lighting added and no clearing of existing forest or trees. Because there will be no off-street parking provided, there are also no landscaping or screening issues. The only external change engendered by the special exception will be a wall sign which has been proposed by Petitioner.

In his filings (Exhibit 8) and at the hearing (Tr. 25-26), Petitioner proposed one illuminated wall sign, designed to match, in size, shape and color, the "Glick Opticians" sign nearby, on the front of the adjacent building. The sign would be three dimensional and would measure 12 feet in length,

⁵ According to a letter from Lynn Cunningham, an expert in traffic engineering, the number of trips generated by the pharmacy in the evening peak hour is 13, not 14 as stated by Technical Staff (Exhibit 14(a)); however this difference is not material since even at the higher rate suggested, a traffic study is not required.

2.5 feet in height and 0.75 feet (*i.e.*, 9 inches) in depth. It will bear the words "Service Pharmacy," as shown in Exhibit 8, depicted below:



The proposed location, color and shape of the sign are shown in the following photos from Exhibit 7(a):



Technical Staff notes that Zoning Ordinance §59-F-4.2 (b) permits one sign per customer entrance, provided the total area of all permanent signs does not exceed 800 square feet. Based on that figure, Technical Staff concluded that the sign proposed by Petitioner, which Staff estimated at about 40 square feet, along with the other existing signs, would not exceed the limits; however, Staff observed that the Department of Permitting Services (DPS), will have to make the final determination when Petitioner applies for his sign permit. The Hearing Examiner agrees that the proposed sign will probably be compliant with the statute and that DPS will make that determination, but notes that the calculation is not quite as simple as Staff indicated, for the proposal calls for a three-dimensional sign, and Zoning Ordinance §59- F-3.4(d) specifies that,

Where three dimensional signs are used, the area of the sign is the total surface area of the sides that can be seen from a single vantage point outside the property lines of the site where the sign is located.

Applying that instruction, the Hearing Examiner estimates that the area of the sign is closer to 62 square feet than the 40 estimated by Technical Staff.. Moreover, under §59-F-4.2 (b)(2)(B), wall signs are also limited in area to 2 square feet for each linear foot of building frontage. In any event, DPS will sort out the measurements, and the Hearing Examiner has proposed a condition requiring Petitioner to file a copy of his sign permit with the Board of Appeals before posting the sign.

The only other issue warranting mention is the question of whether establishing a pharmacy in this building might create a safety concern, as suggested in the anonymous letter (Exhibit 13) cited in Part I of this report. As stated above, the letter was not admitted into evidence; however, the Hearing Examiner did ask Petitioner to at least address the question of security in his evidence. The Hearing Examiner is satisfied from the testimony that that Petitioner will take all steps required by law to protect the drugs in his pharmacy from theft or unauthorized access, including areas inaccessible to the public, locked “cabinet safes” for narcotics and various cameras and security monitoring devices. Tr. 22-23. Safety compliance will be monitored by the State of Maryland.

There has been no opposition to this petition and the only concerns to have been raised, traffic impact and the safety of pharmacies in the area, have been discussed above. There is no evidence that establishing a pharmacy in this location poses any hazard to the community from traffic or security problems.

III. SUMMARY OF THE HEARING

The only witness to testify at the hearing was the Petitioner, Hector Ayu.

Stanley D. Abrams, Esquire - Opening Statement (Tr. 7-17):

Petitioner's attorney, Stanley Abrams, Esquire, noted that Petitioner had applied for a professional pharmacy to be located in a three-story existing office building, which is predominantly, if not exclusively, occupied by physicians and other medical specialties. It is located at the corner of Spring Street and Fairview Avenue, which is directly behind the parking garage, almost attached to the Holiday Inn and the Park and Planning Commission.

The special exception area would replace an existing suite of medical offices on the lobby floor of the main level. It has 1540 square feet of gross floor area, and 1525 square area of net usable floor area. The building itself has a little over 15,000 square feet of floor area. The office building is currently, and has been for many years, zoned C-O. It was constructed, as far as Mr. Abrams could determine, about 1967 or 1968.

The building has no direct entrance to the pharmacy from the street. In order to enter the pharmacy, you would have to enter from Spring Street into the main lobby, and immediately turn left into the area where the pharmacy is going to be located on the lobby level.

Mr. Abrams stated that Petitioner accepts Technical Staff's definition of the neighborhood. and their recommendations for conditions in this case. He asked that the pharmacy be authorized now to have five staff members (including the pharmacist), even though he would likely begin with only three staff members.

Mr. Abrams stated that the site is across the street from the Central Business District, in an area which has been recommended for, and in fact zoned C-O, for many years. He also described the general neighborhood and addressed the traffic concerns of the Woodside Park Citizens Association. Mr. Abrams pointed out that all pharmacy activities are confined to the interior of the building, and there will be a very low employee/customer activity base. And there is ample parking, with a public garage across Spring Street and metered spaces along Spring Street, all the way from Georgia Avenue back to Colesville Road. There are also sidewalks on both sides of Spring Street.

According to Mr. Abrams, the focus of the proposed pharmacy is out onto Spring Street, and it has no direct connection out onto Fairview, which was the street that concerned WPCA. Moreover, another office building wraps around the subject office building, and it is the wrap-around building that has connections onto Spring Street, as well as onto Fairview. Thus, the proposed pharmacy cannot really cause a traffic problem on Fairview.

Problems with speeding and things of that nature are enforcement problems, not an objection to the pharmacy.

Mr. Abrams also objected to the admission of Exhibit 13 (the anonymous letter) into evidence because it is unreliable hearsay. [That objection was granted, but the Hearing Examiner asked Petitioner to at least address the question of security in his evidence.]

Mr. Abrams pointed out that Petitioner has no control over the remainder of the building, including the common areas, in terms of the security problem. If there is a security problem there, Petitioner cannot go out and direct his own cameras in common areas; nor can he erect separate locks or doors, under his lease.

Hector Ayu (Tr. 18-41):

Petitioner, Hector Ayu, testified that he is a licensed pharmacist in Maryland and has been such for 12 years. He immigrated to this country 25 years ago from Nigeria, where he had been a

hospital administrator. At the age of 38, he went back to University of Maryland to study pharmacy, and he graduated at the age of 41. Since then he has been practicing, and he currently works for Eckard Corporation in Gambrills, Maryland. He now seeks to open his own business.

To do so, he entered into a lease agreement (Exhibit 9) for space within the subject building (Suite 110) to operate a pharmacy. Mr. Ayu testified that there is no entrance to Suite 110 from the street. One enters from the lobby. The building predominantly houses doctors and dentists. Mr. Ayu introduced a petition (Exhibit 24) signed by doctors and dentists in the building supporting his application.

The pharmacy is going to be in two parts – the prescriptions area, which will be closed and secured, and the OTC sections that will deal with over-the-counter medications as well as some medical supplies. Customers would first approach through the retail area and then go up to a counter type area for the prescriptions. There is also a bathroom in the pharmacy area.

Mr. Ayu testified that, by law, only recognized personnel can get into the pharmacy. There is a door that is locked all the time. According to Mr. Ayu, before the State of Maryland would approve that place for a pharmacy, it must pass some security tests. He stated that the pharmacy will be “secured” and “monitored.” There will be cameras and security devices throughout, so it will be very secure. The narcotics, inside the secure pharmacy area, will be in locked cabinet safes. Mr. Ayu further testified that, in addition to filling prescriptions, he would sell over-the-counter drugs, like pain medicine and medical supplies like wheelchairs or prosthetics, but not items like tobacco.

Mr. Ayu expects to open business with three staff, consisting of himself, a technician and a cashier. In the future, if the business is successful, he will add up to two more technician/cashiers. Hours will be Mondays through Friday, 9:00 a.m. to 7:00 p.m.. Saturday, it's going to be 9:00 a.m. to 2:00 p.m.. Employees will arrive around 8:00 a.m. The store will be closed on Sunday.

Petitioner intends one, three-dimensional sign, measuring 12 feet by 2.5 feet by 9 inches, almost identical to the one already there, by the Glick's Optician, in front of building, as shown in photographic exhibits.

Mr. Ayu testified that most of his customers will come from the medical offices in the vicinity, including in the building. Parking is available in the garage across the street and at meters on the street. To his knowledge, the closest drug store is about a half a mile away.

Mr. Ayu further testified as to his compliance with the general and specific requirements of the Zoning Ordinance, and as to his willingness to pay the fee to participate in the Silver Spring Parking Lot District Program. He also indicated that the pharmacy would be typical and have no non-inherent adverse effects on his neighbors.

Mr. Ayu identified the photographs in Exhibits 7(a) through (e), and testified that he personally took them and that they accurately represented the scene today. Mr. Ayu also identified the Floor Plan (Exhibit 4(c)), which is the site plan in this case, and noted that it shows the walls to be removed, each labeled, "TBR." Exhibit 4(e) shows the same space, with the walls removed.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as

Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a retail establishment (a drug store) in an office building. Characteristics of the proposed retail establishment use that are consistent with the “necessarily associated” characteristics of retail establishment uses in office buildings will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with retail establishment uses in office buildings, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggests that the inherent characteristics associated with the proposed use

are “daily arrival and departure of staff and intermittent entry and exit of customers. Activities are internalized within the building.” Exhibit 19, page 8. The Hearing Examiner would expand this list to include the existence of retail space, the accompanying goods, equipment and signage, the security paraphernalia associated with a retail pharmacy and the need for some parking, in addition to the daily arrival and departure of staff and intermittent entry and exiting of customers inside the building, as suggested by Technical Staff. Technical Staff also notes that possible non-inherent characteristics of this use may include exterior access or sale of non-pharmaceutical items; however, Staff observes that Petitioner does not propose either. Technical Staff therefore concludes that there are no non-inherent effects sufficient to require a denial.

The Hearing Examiner would go even further, finding no non-inherent characteristics whatever in this case, based on the record. There will be no exterior building changes, other than signage compliant with the Zoning Ordinance. The Hearing Examiner agrees that the physical and operational characteristics of the proposed pharmacy are no different from what is typically encountered with any small pharmacy. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use. Actually, this particular retail use will create less traffic and parking than similarly sized pharmacies at different sites because many of the Petitioner’s customers will likely come from the medical office building itself and from the immediate vicinity.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A “retail establishment (a drug store) in an office building” is a permissible special exception in the C-O Zone, pursuant to Code § 59-C-4.2(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.48 for a retail establishment (a drug store) in an office building as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board’s technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the *North & West Silver Spring Master Plan*, approved and adopted in August 2000. It accepts the current C-O zoning (page 36), and a retail establishment (drug store) in an office building is allowed by special exception in that zone. *See* Zoning Ordinance §59-C-4.2 (d). The Master Plan makes no recommendation specific to this site, but as noted by Technical Staff, it identifies areas around the Silver Spring CBD and along major roads where low

intensity office uses are present or recommended as a transition in use, density, and building heights. Technical Staff found that the building at 1111 Spring Street fits this description. Exhibit 19, pp. 5-6.

The Master Plan's recommendations regarding special exceptions address, almost exclusively, special exceptions in residential zones. See pages 42-43. The one general recommendation for special exception uses concerns landscaping, which has no application to the subject petition because the requested use is inside of an existing office building.

Technical Staff concludes, and the Hearing Examiner agrees, that "the proposed use is consistent with the *North and West Silver Spring Master Plan . . .*" Exhibit 19, page 9.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because, as Technical Staff observes, it will not noticeably alter the mix of uses in the surrounding neighborhood. The proposed use will not alter population density, design, scale or bulk and proposes no new structure. Its activities will take place indoors, and the intensity and character of traffic and parking will also be virtually unchanged. On a positive note, the pharmacy will serve the needs of the many nearby medical offices.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. On the contrary, having a nearby pharmacy within a medical office building should enhance the value of surrounding properties by making needed services readily available.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use (*i.e.*, a pharmacy), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. There will be no lighting added outside the building as a result of the pharmacy.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed use is in a commercial, not residential area, which is consistent with the Master Plan recommendations. Given that the use will take place inside of an office building, it will have no effect on any neighboring one-family residential area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or

workers in the area at the subject site. On the contrary, it will improve health by providing easily accessible pharmaceuticals to those utilizing area medical offices.

Petitioner will comply with all applicable health and safety regulations.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioner testified that there were adequate public facilities serving the subject site.

Tr. 32-33. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,⁶ as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”). The Technical Staff did do such a review, and it determined that the proposal will satisfy LATR without the need for a traffic study, based on trip-generation data from the Institute of Transportation Engineers’ Trip Generation – 7th Edition. The total number of estimated peak hour trips for the entire medical office building (15, 040 square feet of usable floor space) is 12 morning peak

⁶ Policy Area Transportation Review (PATR) is no longer considered in the APF review under the FY 2005 AGP.

hour trips and 27 evening peak hour trips. According to Transportation Staff, 5 of those morning trips and 14 of the evening trips would be attributable to the pharmacy. See Transportation Planning Staff's report, attached to Exhibit 19. The FY 2005 Annual Growth Policy (AGP) would not require a traffic study to satisfy Local Area Transportation Review because the proposed special exception use generates fewer than 30 peak-hour vehicular trips within the weekday morning and evening peak periods. See the July 2004 LATR Guidelines, of which the Hearing Examiner takes official notice.

There is no vehicular access onto the subject site. Pedestrian access to the building is via sidewalks on Spring Street, where the main entrance to the building is located. Spring Street has metered parking in front of the property, and a public parking garage is located across the street. According to Technical Staff, the proposed use would ordinarily be required to provide 8 off-street parking spaces, as prescribed for general retail of this size under Zoning Ordinance §59-E-3.7; however, the subject site is within the Silver Spring Parking District and therefore Petitioner must pay an *ad valorem* tax in lieu of satisfying the number of required off-street spaces. A condition was recommended by Technical Staff and the Planning Board to this effect, and Petitioner has agreed to it. Tr. 30. That condition is recommended in Part V of this report.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: The Woodside Park Civic Association raised a concern about the potential impact of traffic generated by the proposed pharmacy (Exhibit 16). Transportation Planning Staff found that, given the modest, 1525 square feet of floor space allocated for the

proposed use, the special exception would not adversely affect nearby roadway conditions or pedestrian facilities. Thus, the evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 19)] provide sufficient evidence that the specific standards required by Section 59-G-2.48 are satisfied in this case, as described below.

Sec. 59-G-2.48. Retail establishments in an office building.

Retail sales and personal service establishments in an office building are subject to the following requirements:

- (a) *Only the following types of establishments are allowed:*
- Barber and beauty shop.*
 - Delicatessen.*
 - Drug store.*
 - Dry cleaning and laundry pick-up station.*
 - Newsstand.*
 - Eating and drinking establishment.*
 - Specialty shop.*

Conclusion: The proposed use is a drug store, one of the permitted establishments.

- (b) *The establishments must be primarily for the service of tenants and employees of the building or group of buildings on the same lot or group of contiguous lots in common ownership or control, and the tenants and employees of adjoining and confronting lots, except that the requirements of this section do not limit the patronage of an eating and drinking establishment on weeknights, Saturdays and Sundays; provided that: (1) there exists sufficient off-street parking to accommodate the patrons of the eating and drinking establishment, and (2) the operation of the eating and drinking establishment will not have adversely effect the use and enjoyment of surrounding properties.*

Conclusion: The proposed use is primarily for the service of users of medical offices in the building and immediate vicinity. Tr. 27-28.

- (c) *There must be no entrances directly from the exterior to the establishments except an eating and drinking establishment may have a direct entrance from the exterior of the building if the Board finds that a direct exterior entrance to the eating and drinking establishment will not adversely effect the use and enjoyment of surrounding properties.*

Conclusion: The only entrance will be from the main lobby of the building. There are no entrances directly from the exterior of the building.

- (d) *The establishments must be so located and constructed as to protect tenants of the building from noise, traffic, odors and interference with privacy.*

Conclusion: As stated by Technical Staff, the establishment is located in its own suite with an internal public area (the retail or “OTC” space), thus minimizing interference with other tenants. No odors or noise are anticipated, and traffic will be minimal.

D. Additional Applicable Standards

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F. Furthermore, a special exception in a residential zone must incorporate glare and spill light control devices to minimize glare and light trespass; may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles; “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise

permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

The subject special exception involves only the use of internal retail space in an existing commercial building located in a commercial zone. There will be no changes to the building's structure, landscaping, lighting or anything else external to the building, except for signage compliant with the Zoning Ordinance. Therefore, none of the additional standards relating to residential zones apply. Forest conservation, parking and signage were discussed above, in Part II. D. of this report. As to Development Standards, Technical Staff observes that "[t]his building is subject to 'The Amendment of 1978' (59-C-4.324) which permits a lawful structure built in the C-O zone before October 31, 1978 to be considered a conforming structure for the purpose of continued use, structural alterations, repairs or reconstruction so long as it is not increased beyond the dimensions which existed on October 31, 1978." Exhibit 19, page 6. The proposed use will require some interior remodeling but no structural changes and no increase beyond existing dimensions. For this reason, Technical Staff concluded that the C-O Zone development standards are not applicable to this proposal, and the Hearing Examiner agrees.

Based on the testimony and evidence of record, I conclude that the retail pharmacy use in an office building proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2655, seeking a special exception for a retail establishment use (a drug store) in Suite 110 of the office building located at 1111 Spring Street, in Silver Spring, Maryland, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of his testimony and exhibits of record, and by the testimony of his witnesses and representations of counsel identified in this report.

2. Petitioner's pharmacy floor space is limited to a maximum of 1525 square feet.
3. Petitioner's office hours are limited to 9 a.m. to 7 p.m., Monday through Friday, and 9 a.m. to 2 p.m. on Saturday; however employees may arrive at 8:00 a.m. each day.
4. Petitioner may not have more than five employees operating in the pharmacy at one time, including the pharmacist and up to four technician/cashiers.
5. Petitioner shall participate in the Silver Spring Parking Lot District Program and pay the *ad valorem* tax in lieu of satisfying the number of required off-street parking spaces (eight) that are not on the site.
6. Petitioner may erect a single, illuminated, wall sign identifying the entrance to his pharmacy; however, the sign may be no larger than permitted by the Zoning Ordinance (as determined by the Department of Permitting Services), and Petitioner must first supply the Board with a copy of his sign permit before posting the sign.
7. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: January 4, 2006

Respectfully submitted,

Martin L. Grossman
Hearing Examiner